No. 84-808

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT and
SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

POINTS IN REPLY

Despite respondents' attempts to obscure the true impact of the lower courts' holdings, this case presents legal questions of national importance, as evidenced by the fact that 11 States and two major groups representing a large number of water users have filed briefs in support of petitioners' request for a writ of certiorari.

The Pyramid Lake Paiute Tribe of Indians (the "Tribe") and the Secretary of the Interior (the "Secretary") have both filed briefs opposing review of the Ninth Circuit's decision in this case. Petitioners make the following points in reply.

1. Respondents repeatedly assert that the courts below did no more than approve the Secretary's use of his "discretion." [1] The Secretary even states that the Endangered Species Act ("ESA") does not require "slavish devotion" to the immediate restoration of threatened or endangered species (Sec. Br. 15 n.8), and that the Court of Appeals "has not 'required' the Secretary to do anything" (*id.* at 17). But other parts of the Secretary's brief belie these assertions. Thus, he concedes that the ESA "expressly directs" the Secretary to utilize his programs to "conserve" (*i.e.*, to bring the species to a point where they are no longer listed), states that the ESA requires "affirmative" measures, methods and procedures to reach that goal, and cites to the Act's legislative history for the proposition that Congress "require[d]" the Secretary "to take positive steps" in this direction.[2]

Even more importantly, two separate events—wholly ignored by respondents in their briefs—demonstrate that

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[1] Tribe Br. 13; Sec. Br. 10. "Tribe Br." and "Sec. Br." refer to the separate briefs in opposition filed by the Tribe and the Secretary in this case.

[2] Sec. Br. 14 & 16 n.9.

the courts below did not merely approve a discretionary act but instead mandated the use of water until endangered and threatened species are wholly restored. These events also demonstrate that both the Secretary and the Tribe have taken positions contrary to those they assert in their opposition briefs:

(a) Recognizing that the District Court had entered an order which stripped the Secretary of his discretionary authority,[3] the Secretary moved the court to amend its judgment. Pet. App. 57a. He was concerned that the District Court allowed him no discretion to suggest reasonable and prudent alternatives that would fulfill the objectives of the Washoe Project Act without violating the ESA. *Id.* at 60a. In fact, he specifically stated in his motion: "The Secretary is concerned that the judgment as it now reads, *ordering* him to utilize the waters of Stampede Reservoir for this fishery until the fish are no longer classified, might prevent the adoption of such reasonable and prudent alternatives." Pet. App. at 60a-61a; emphasis added.

The District Court misunderstood the thrust of the motion and viewed it as addressing only the Secretary's discretion in determining the *amount* of water necessary to restore the fish. Pet. App. 62a. The court therefore denied the motion on the ground that nothing in the court's judgment directed the Secretary "to release more Stampede water than is necessary to assure the recovery of the endangered and threatened species of Pyramid Lake." *Id.* Instead of allowing the Secretary the re-

[3] The District Court's judgment states, in part:

> The Secretary of the Interior is ordered to utilize the water stored in Stampede Reservoir for the benefit of the Pyramid Lake Fishery until such time as the cui-ui and Lahontan cutthroat trout are no longer classified as endangered or threatened species or until sufficient water becomes available from other sources to conserve the cui-ui and Lahontan cutthroat trout. [Pet. App. 55a.]

quested discretion, the District Court thereby made doubly clear that it was mandating the use of whatever water was necessary to restore the species. In direct contradiction to the position he asserts here, the Secretary thus acknowledged below that the District Court's judgment (affirmed by the Court of Appeals) was mandatory and left no room for discretion on his part.

(b) The Fish and Wildlife Service has taken the position not only that the District Court mandated a duty on the part of the Secretary but that the judgment below was wrong.

The Service's Director, acting pursuant to a memorandum from an Associate Solicitor, wrote his Regional Directors that he in effect was disavowing the District Court's opinion in this very case (see his letter and accompanying memorandum attached as an Appendix hereto). The accompanying memorandum stated, *inter alia*:

> In ruling for the defendants, it is our opinion that the district court imposed greater burdens on federal agencies under ESA than those originally intended by Congress. [App. 3a.]
>
> * * * *
>
> [The District Court] inappropriately applied the analysis of the Supreme Court in *Tennessee Valley Authority* v. *Hill* (a case focusing on the jeopardy standard now found in subsection 7(a)(2)) to a dispute regarding the Secretary's authority to discretionarily operate Stampede Reservoir for the benefit of endangered and threatened species (a subsection 7(a)(1) case). * * * It compounded its error, however, by going further and *mandating* endangered species conservation as the priority project purpose until such time as the cui-ui and Lahontan cutthroat trout are recovered. [App. 8a-9a; emphasis in the original.]
>
> * * * *
>
> Heretofore, the jeopardy standard under subsection 7(a)(2) was considered to be the only substantive restriction on agency action under section 7. More-

> over, it has always been the position of the Service that a federal agency could still be in compliance with section 7 for a given project that adversely affects listed species, so long as the anticipated level of takings or impacts were not so high as to result in a finding of jeopardy. [App. 9a; footnote deleted.]
>
> * * * *
>
> Thus, it would now be unacceptable [under the District Court's opinion] for a proposed project to be slightly adverse to a listed species or even neutral in its impacts. It would have to affirmatively promote the recovery of affected listed species, even at the expense of overriding other legally-authorized project purposes. [App. 10a.]
>
> * * * *
>
> The attempt of the district court to mandate a particular program represents an unwarranted limitation of the discretionary conservation authorities granted to federal agencies. [App. 11a.]

Thus, the attempts by respondents before this Court to portray the decisions below as nothing more than approvals of the Secretary's discretion are disingenuous at best. And whether the Fish and Wildlife Service is or is not correct in its interpretation of the Act, its conclusions clearly show that there is conflict within the Department of the Interior itself over the proper interpretation of the ESA—a conflict that requires resolution by this Court.

2. The Tribe also contends that this case involves nothing more than a factual finding. Tribe Br. 17. But this position is directly contrary to the position the Tribe has asserted before this Court in a Petition for Writ of Certiorari in this same case relating to a denial of attorneys' fees.[4] The Tribe there told the Court that the dispute in

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[4] Petition for Writ of Certiorari, *Carson-Truckee Water Conservancy District* v. *Clark*, 748 F.2d 523 (9th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. —— (U.S. Feb. 26, 1985) (No. 84-1384) (hereinafter "Tribe Pet.").

this case centers on "whether the ESA required the Secretary to operate Stampede Reservoir under a 'jeopardy' or a 'conservation' standard." Tribe Pet. 5. And this, said the Tribe, was a "legal question." *Id.* The Tribe's characterization of this case in its attorneys' fees petition is thus directly contradictory to the position it takes on the merits here.

3. Respondents argue that this case is on all fours with *TVA* v. *Hill*, 437 U.S. 153 (1978), in which this Court ruled that the ESA prevails wherever a proposed action would destroy an endangered species.

Neither the Ninth Circuit nor the District Court, however, relied on *TVA*'s "irreconcilable conflict" doctrine to deny petitioners' access to water suplies.[5] Significantly, neither court *could* have invoked the doctrine because federal authorities had not adhered to the ESA's procedural requirements and analyzed a range of alternative water-use scenarios to determine whether or not *all* proposed use patterns would involve an "irreconcilable conflict" with the livelihood of the cui-ui or Lahontan cutthroat trout.[6]

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[5] To illustrate, the Ninth Circuit's opinion mentions the *TVA* case only once in its opinion, and it does not cite the case in connection with the proposition that an "irreconcilable conflict" is involved in this case. Pet. App. 7a. Likewise, in the District Court's October 4, 1982, opinion which adjudicated issues arising under the ESA, the court did not rely on *TVA*'s "irreconcilable conflict" theory. Instead, it cited the *TVA* case to support its expansive views of the Secretary's duties under the ESA. Pet. App. 45a.

[6] As this Court emphasized in *TVA*, the *sine qua non* of an "irreconcilable conflict" determination is a conclusion that no action can be taken without destroying the habitat of an endangered species. 437 U.S. at 171 ("We begin with the premise that operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat"). Before such a definitive conclusion can be reached, the Act requires the Fish and Wildlife Service to initiate consultation, prepare a biological opinion, and analyze all possible alternatives. ESA §§ 7(a)(3)

Moreover, the Secretary conceded below that this case did not involve an irreconcilable conflict between the Washoe Project Act and the ESA. Petitioners asked *that very question* of the Secretary in their interrogatories during the trial stage of this case:

> *Int. No. 23.* Do the federal defendants contend that 16 U.S.C. § 1536 [Section 7] prevents them from utilizing (within the meaning of said section) Stampede Dam to provide municipal and industrial water?
>
> *Answer to Int. No. 23.* The Federal Defendants do not so contend. [Trial Exhibit No. 226.]

The courts below questioned the feasibility of one plan that allegedly would have reduced flows during critical periods, but the Fish and Wildlife Service's failure to complete Section 7's consultation requirements and prepare a biological opinion and analysis of alternatives left the courts unable to make an "irreconcilable conflict" determination. The District Court found petitioners' proposed plan unacceptable under the ESA because it "would jeopardize the fish." Pet. App. 9a. Respondents have attempted to bootstrap this limited conclusion into a broad-based factual finding that *any* plan for with-

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and 7(b). Remarkably, *none* of these procedural requirements was satisfied in this case. The failure to follow the ESA's obligations not only violated the statute, but it deprived the courts below of the factual record necessary to conclude that use of water from the Stampede Reservoir under any and all circumstances would pose an "irreconcilable conflict" with fish in the Reservoir. To illustrate, when the Service completed a limited consultation in connection with a short-term request for water use for municipal and industrial purposes, the Service concluded that water withdrawals would be possible so long as the Service could "vary its request for water and realize releases that will maximize the spawning effort of both listed species." Exhibit A at 2, Trial Document No. 413 (July 20, 1982). Thus, it is apparent that if the Service had completed a full consultation and evaluation of alternatives, as required by the ESA, no "irreconcilable conflict" would have been found.

drawing *any* amount of water would jeopardize the fish and be unlawful under the ESA. Precisely because the ESA's procedural obligations were ignored in this case, the courts below were in no position to make such a finding, and they did not do so.

4. Respondents cannot brush aside the ESA's consultation requirements on the theory that " 'the Secretary has not undertaken a project that threatens an endangered species' " (Tribe Br. 18-19) or that petitioners have not submitted a proposal that would bring the consultation requirements into play (Sec. Br. 11-12). Section 7's procedural requirements are designed to insure that the Secretary has an opportunity to evaluate a request for a federal action *before* it has been undertaken. *See, e.g.*, ESA § 7(a)(3) ("a Federal agency shall consult with the Secretary *on any prospective agency action* at the request of * * * the prospective permit or license applicant * * *.") (emphasis added.)[7] Indeed, in the cases cited by the Tribe, consultation was undertaken and completed before a federal project was undertaken. *See* Tribe Br. 19-20.

As for the argument that petitioners have failed to submit a proposal that would trigger the consultation provisions, the Secretary has again turned the Act around. Under the clear language of the ESA, it is the Secretary who has the mandatory obligation to propose and evaluate alternative actions. As Section 7(b)(3)(a) of the statute provides, "the Secretary *shall suggest* those reasonable and prudent alternatives" which would not jeopardize the existence of an endangered or threatened species and which "can be taken by the Federal agency or applicant in implementing the agency action" (emphasis added). By failing to comply with this statutory directive, the Secretary violated a key procedural safe-

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[7] *See also* H.R. Rep. No. 567, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2810; H.R. Rep. No. 567, 97th Cong., 2d Sess. 14, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2814.

guard included in the ESA and ignored his obligation to accommodate the utilization of resources with the needs of endangered and threatened species.[8]

As a result of its complete failure to focus on the ESA's procedural requirements, the Ninth Circuit no longer requires that the Secretary evaluate proposed actions and their alternatives under Sections 7(a)(2) and 7(a)(3) to determine whether or not they will "jeopardize the continued existence" of an endangered or threatened species. Instead, the Secretary must reject any proposed action that will not actively assist in the recovery of an endangered species—regardless of whether the action will jeopardize the continued existence of the species. *See* Pet. App. 7a-8a.[9] This approach reads Sec-

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[8] In an attempt to excuse the lower courts' failure to adhere to the ESA's procedural requirements, the Tribe asserts that "before the district court the petitioners specifically rejected any notion that the Secretary should conduct a § 7(a)(3) consultation, preferring instead to rely on their own plan for the operation of Stampede." Tribe Br. 11. The record shows otherwise. Petitioners repeatedly argued below that the Secretary has a duty to consult with the Fish and Wildlife Service to determine ways in which Stampede can be operated for its congressionally mandated purposes without jeopardizing the continued existence of the cu-ui and Lahontan trout. *See, e.g.*, Post Trial Brief (Part II) of Plaintiffs Carson-Truckee Water Conservancy District and Sierra Pacific Power Company 21-22, 25 (April 19, 1982); Memorandum in Support of Plaintiff's Motion For New Trial Or, In the Alternative, For Amendment and Modification of Findings, Conclusions and Judgment 2-3, 12-13, 21-22, and 24-25 (Nov. 8, 1982); Opening Brief for Appellants Carson-Truckee Water Conservancy District and Sierra Pacific Power Company at 2-3 and 30-34, *Carson-Truckee Water Conservancy District* v. *Clark*, 741 F.2d 257 (9th Cir. 1984); Reply Brief of Appellants Carson-Truckee Water Conservancy District and Sierra Pacific Power Company at 4-5, *Carson-Truckee Water Conservancy District* v. *Clark*, 741 F.2d 257 (9th Cir. 1984).

[9] In accordance with this unprecedented interpretation of the ESA, the Ninth Circuit affirmed a District Court order that *requires* the Secretary to withhold *all* water in the Stampede Reser-

tion 7's procedural requirements and substantive standard out of the Act, replacing them with a vague "affirmative duty" standard. As pointed out by *amici*, the new statutory standard is such a radical departure from the language of the Act and prior agency interpretations of the statute that it even conflicts with the regulations the Secretary of the Interior has promulgated under the Act.[10]

5. The Secretary concedes that when the Washoe Project Act was passed, Congress focused on the fishery and provided *other facilities* to make sure that the fishery was maintained. Sec. Br. 21. But, argues, the Secretary, "circumstances have changed since then." *Id.* at 21-22. Nowhere does the Secretary explain why changed circumstances should alter the Secretary's duties unless the circumstances have been brought to the Congress's attention and Congress has agreed that the Secretary's duties should change by raising the $2 million spending limit imposed by the Washoe Project Act on fish and wildlife expenditures.

6. The Secretary argues that the courts below do not require him to restore endangered or threatened species to "historical levels." Sec. Br. 21. Instead, he asserts —without any support—that a species "presumably" could be removed from the list of endangered or threatened species even though it has not recovered to historical levels. *Id.* By asserting that his obligation to "restore" endangered and threatened species may involve something less than a return to historical levels, the Secretary has underscored the ambiguity inherent in the lower courts' reading of the ESA. Although the

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voir until the cui-ui and Lahontan cutthroat trout no longer qualify as endangered or threatened species. *See* n.3, *supra*.

[10] *See* Brief *Amici Curiae* of the National Water Resources Association and the Association of California Water Agencies at 7-8.

courts below mandated that the Secretary must take affirmative steps to restore, the Secretary has admitted that even he cannot identify when this duty will be discharged.

7. As alternative grounds for supporting the result obtained below, the Tribe attacks the District Court's decision in *Carson-Truckee Water Conservancy District* v. *Watt*, 537 F. Supp. 106 (D. Nev. 1982) ("Carson-Truckee I") (Pet. App. 23a). None of the factors recognized by the Court in *Berkemer* v. *McCarty*, 104 S. Ct. 3138, 3148-49 n.23 (1984), is present in this case that would support consideration of these questions without the filing of a cross-petition.[11] Moreover, nothing in the Ninth Circuit's opinion casts doubt on its affirmance of the relevant portions of *Carson-Truckee I*, and the principles of standing and private rights of action there upheld are well settled. Therefore, the Court should refuse to reach the Tribe's alternative grounds.

CONCLUSION

As the briefs for petitioners, 11 Western States, the National Water Resources Association, and other *amici* demonstrate, this case presents legal issues of great national importance. Accordingly, petitioners respectfully renew their request that the Court grant certiorari and reverse the Ninth Circuit's ruling.

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[11] Despite having requested and received an extension of time for the purpose of filing a cross-petition for certiorari, the Tribe has chosen instead to urge these grounds upon the Court in its Brief In Opposition.

Respectfully submitted,

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APPENDIX

APPENDIX

(SEAL)

UNITED STATES DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
Washington, D.C. 20240

[October 5, 1983]

In Reply Refer To:
FWS/OES

Memorandum

To: Regional Director, Regions 1, 2, 3, 4, 5, 6, and 7 (ARD/FA or ARD/AFF) Acting Associate

From: Director

Subject: Solicitor's Opinion Regarding Endangered Species Act (ESA) Conservation Obligations of Federal Agencies

Attached, please find the above-mentioned Solicitor's (SOL) opinion (dated September 7, 1983). In it, SOL rejects the district court's conclusion that (Section 7(a)(1) of the ESA) can mandate a *particular* conservation program for a listed species at the expense of other project objectives. In other words, SOL feels Federal agencies have the authority to integrate endangered species conservation into project planning but are not required to do so in any particular manner. The only mandatory requirement placed on Federal agencies is to insure that their actions are not likely to jeopardize listed species (Section 7(a)(2) of the ESA). Thus, Biological Opinions should not include statements saying that unless a given agency adopts a particular conservation recommendation, it will be "in violation of its Section 7(a)(1) responsibilities."

The district court's decision is not precedent setting and should be applied only to the Stampede Reservoir case.

/s/ Roman H. Koenings

Attachment

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Solicitor
Washington, D.C. 20240

(September 7, 1983)

Memorandum

To: Director, United States Fish and Wildlife Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Endangered Species Act conservation obligations of Federal agencies

We have recently reviewed the district court opinion in *Carson-Truckee Water Conservancy District v. Watt*, 549 F.Supp. 704 (D. Nev. 1982), *appeal filed* No. 83-1549 (9th Cir., Jan. 3, 1983), which discussed the conservation obligations of Federal agencies under the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531 *et seq.* In the *Carson* case, the plaintiffs sought to force the Bureau of Reclamation to store additional water in the Stampede Reservoir for municipal and industrial use. Ultimate diversion of the stored water for such uses would reduce the flow of water into Pyramid Lake, the habitat for two fish which are listed under the ESA. The plaintiffs had contended that the ESA did not prevent the Secretary from operating Stampede Reservoir for municipal and industrial uses as long as that operation would not jeopardize the continued existence of the cui-ui fish and the Lahontan cutthroat trout. In response to this contention, defendants argued that the Secretary had an affirmative obligation under the ESA to *conserve* those two fish above and beyond the substantive prohibition found in Section 7(a)(2) against jeopardizing their continued existence. The defendants thus cited this higher conservation responsibility as authority for operating Stampede Reservoir so as to aid in the recovery

of the cui-ui and the Lahontan cutthroat trout. In ruling for the defendants, it is our opinion that the district court imposed greater burdens on federal agencies under the ESA than those originally intended by Congress. Our analysis follows.

Statutory Framework

Five subsections of the ESA are relevant for purposes of analyzing the district court's decision in the *Carson* case. First, subsection 2(c)(1) of the ESA sets forth the general hortatory policy that "all Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c).

Second, subsection 3(3) of the Act, 16 U.S.C. § 1532(3), states in part:

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. . . .

A third relevant part of the ESA is subsection 5(a), 16 U.S.C. § 1534(a), which expressly confers upon the Secretary of the Interior the responsibility for implementing "a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title." This subsection has generally been considered to be the true source of the Secretary's affirmative conservation responsibilities under the ESA.

The two remaining relevant parts of the Act are subsections 7(a)(1) and 7(a)(2).[1] Subsection 7(a)(1), 16

[1] Before the enactment of the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, the "conserva-

U.S.C. § 1536(a)(1), restates the general hortatory language in subsection 2(c)(1) quoted above and constitutes an affirmative grant of authority to Federal agencies to aid in the conservation and recovery of listed species through existing agency programs:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

Subsection 7(a)(2), 16 U.S.C. § 1536(a)(2), on the other hand, sets out the Act's major substantive limitation on the exercise of Federal agency discretion by requiring that each agency shall:

> in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been

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tion" and "jeopardize" standards of section 7 were combined in one lengthy sentence. The 1978 Amendments added an exemption process and divided the "conservation" and "jeopardize" provisions into separate sentences within subsection 7(a). Finally, the Endangered Species Act Amendments of 1979, Pub. L. No. 96-159, 93 Stat. 1241, separated the "conservation" and "jeopardize" standards into subsections 7(a)(1) and 7(a)(2), respectively.

> granted an exemption for such action by the Committee pursuant to subsection (h) of this action [*sic*; read "section" in ESA]. . . .[2]

Analysis

Although the above subsections of the ESA constitute the relevant legal framework for addressing the issues raised in the *Carson* case, the district court only relied upon subsections 2(c)(1), 3(3) and 7(a)(2) in issuing its opinion. After a cursory recital of the provisions of the first two of those subsections, the district court cited the Supreme Court decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) as standing for the proposition that the ESA "gives endangered species the highest priority over all federal projects." *Carson, supra*, 549 F. Supp. at 709. The district court then went on to cite and adopt the holdings of two migratory bird hunting regulation cases involving endangered species, *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977) and *Connor v. Andrus*, 453 F. Supp. 1037 (W.D. Tex. 1978).[3] Relying upon the above cases, the district court in the *Carson* case concluded that

> . . . the Secretary is required to give the Pyramid Lake fishery priority over all other purposes of Stampede until the cui-ui fish and the Lahontan cutthroat trout are no longer classified as endangered or threatened. *Carson, supra*, 549 F. Supp. at 710.

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[2] Subsection 7(a)(2) thus contains two substantive prohibitions: federal agencies shall not "jeopardize" the continued existence of a listed species or adversely modify its critical habitat. For purposes of this memorandum, any refernece to the "jeopardy" prohibition under subsection 7(a)(2) should be understood to also include the prohibition against adversely modifying critical habitat.

[3] Those cases addressed the relationship between the Endangered Species Act, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706.

We disagree with this conclusion for a number of reasons. To begin with, no one disputes that the Secretary has express conservation responsibilities under the ESA. We have identified these responsibilities as arising specifically from subsection 5(a), and more generally from subsections 2(c)(1) and 7(a)(1), of the Act. Within the Department of the Interior, the agency that has been delegated the Secretary's affirmative conservation responsibilities under subsection 5(a) of the Act is the United States Fish and Wildlife Service. 242 D.M. 1.1A.

Coincidentally, it was also the Fish and Wildlife Service that was the defendant in the *Defenders of Wildlife* and *Connor* cases (relied upon by the district court in *Carson*). The Service was admonished in those two cases for only focusing on avoiding the "jeopardy" of listed species under its migratory bird hunting program. However, those cases did not ultimately turn on the Service's compliance with its conservation responsibilities under the ESA. Rather, they turned on the more narrow grounds of whether the Service had established an adequate administrative record regarding endangered species and migratory bird hunting so as to rebut the charge that the agency's hunting regulations were arbitrary and without a rational basis under the Administrative Procedure Act. In both cases, the Service's regulations were found to be arbitrary, albeit for entirely different reasons. Thus, instead of being viewed as authority for establishing a sweeping new set of stringent endangered species priorities, the *Defenders of Wildlife* and *Connor* cases should be read as fairly narrow cases under the Administrative Procedure Act which do no more than remind agencies of the need to clearly articulate the factual basis for their regulatory actions.

In addition to putting an inappropriate gloss on the *Defenders of Wildlife* and *Connor* cases, the district court in *Carson* also confused the set of priorities created by Congress under subsections 7(a)(1) and 7(a)(2). No

one can dispute after *Tennessee Valley Authority v. Hill* that Congress established endangered species conservation as the highest priority under the latter subsection of the Act. When a proposed project is found likely to jeopardize the continued existence of a listed species, the project must either be exempted under the complicated procedure set forth in subsections 7(e) through (n) of the Act or be modified or abandoned altogether.

Moreover, as shown by the complex amendments to section 7 enacted in 1978, 1979, and 1982, it has been subsection 7(a)(2), with its rigid set of priorities and procedures, that has generated the most Congressional scrutiny and review.[4] It is significant to note, however, that this lengthy Congressional debate regarding section 7 has been marked by conspicuous silence over the substantive impacts, if any, of subsection 7(a)(1), and with valid reason. For while subsection 7(a)(1) could be characterized as a general grant of authority to integrate endangered species conservation into other existing federal programs, that subsection did not, as did subsection 7(a)(2), establish any rigid set of priorities among competing, often conflicting, program objectives. That is, while subsection 7(a)(1) added endangered species conservation to the potential list of generic program goals and authorities for a given project, it did not require that such conservation initiatives be factored in first. Subsection 7(a)(1) had a more limited purpose: it resolved once and for all the question as to whether federal agencies had the authority to add endangered species conservation into their planning processes. No longer could

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[4] See H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 25-28 (1982); S. Rep. No. 418, 97th Cong., 2d Sess. 16-22 (1982); H.R. Rep. No. 567, 97th Cong., 2d Sess. 10-11, 13-15, 24-29 (1982); H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 12-16 (1979); S. Rep. No. 151, 96th Cong., 1st Sess. 3-4, 4-6 (1979); H.R. Rep. No. 167, 96th Cong., 1st Sess. 5-6 (1979); H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18-23 (1978); S. Rep. No. 874, 95th Cong., 2d Sess. 2-7 (1978); H.R. Rep. No. 1625, 95th Cong., 2d Sess., 7-13, 14-15, 19-25 (1978).

agencies argue that they lacked the authority to accomplish that objective. While giving federal agencies this grant of discretionary planning authority, however, Congress did not dictate a particular set of results. It did not mandate that endangered species conservation be accorded the highest priority in all planning efforts.

This difference in approach between subsection 7(a)(1) and 7(a)(2) has a ready explanation. Subsection 7(a)(1) provides federal agencies with the authority to "do good things" for endangered species; *i.e.*, to aid in their recovery through compatible agency programs. Subsection 7(a)(2), on the other hand, focuses on the potential for *conflict* between a given agency program and endangered species conservation. In such conflict situations where the continued existence of a listed species may be at stake, Congress has made the value judgment that endangered species conservation comes first. Any lesser choice could result in extinction, as recognized by the Supreme Court in *Tennessee Valley Authority v. Hill*, *supra*, 437 U.S. at 184-85.

The district court erred in the *Carson* case, by failing to recognize this difference in focus between subsections 7(a)(1) and 7(a)(2). It inappropriately applied the analysis of the Supreme Court in *Tennessee Valley Authority v. Hill* (a case focusing on the jeopardy standard now found in subsection 7(a)(2)) to a dispute regarding the Secretary's authority to discretionarily operate Stampede Reservoir for the benefit of endangered and threatened species (a subsection 7(a)(1) case). As to whether the Secretary had the discretionary authority under the ESA to integrate endangered species conservation into the operation of Stampede Reservoir, there can be no doubt. Subsection 7(a)(1) clearly provides that authority and the district court's opinion should have stopped with that conclusion. It compounded its error, however, by going further and *mandating* endangered species conservation as the priority project purpose until such time

as the cui-ui fish and the Lahontan cutthroat trout are recovered.

This ordering of priorities is not only inconsistent with general Congressional intent for subsection 7(a)(1), it also produces the anomalous result of according greater substantive weight and impact to subsection 7(a)(1) than to subsection 7(a)(2).[5] Heretofore, the jeopardy standard under subsection 7(a)(2) was considered to be the only substantive restriction on agency action under section 7. Moreover, it has always been the position of the Service that a federal agency could still be in compliance with section 7 for a given project that adversely affects a listed species, so long as the anticipated level of takings or impacts were not so high as to result in a finding of jeopardy.[6]

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[5] Although there is no express legislative history directly weighing and comparing the relative strengths of subsection 7(a)(1) with 7(a)(2), there can be no doubt that Congress considered the jeopardy standard of subsection 7(a)(2) as being the substantive cornerstone of section 7:

> The term "is likely to jeopardize" is used because the *fundamental* obligation of section 7(a) of the act is that Federal agencies insure their actions do not jeopardize the continued existence of an endangered or threatened species.

S. Rep. No. 151, *supra* note 4, at 4 (emphasis added).

[6] The current section 7 regulatory definition of jeopardy recognizes that a given project can incidentally take a number of endangered species and still not violate the jeopardy standard. 50 C.F.R. § 402.02. The level of incidental take allowable under subsection 7(a)(2) varies, depending on the relative scarcity of the particular species involved. Congress implicitly ratified this regulatory construction in 1982 by providing in subsections 7(b)(4) and (o) of the Act that incidental takings which occur for a project that received a "no jeopardy" biological opinion, would not constitute a violation of the taking prohibitions of section 9. However, if subsection 7(a)(1)'s affirmative conservation provisions were the true substantive yardstick upon which federal programs were to be measured, Congressional amendments in subsections 7(b)(4) and (o) would have been pointless, since it is difficult to conceive of a

If one followed the logic of the *Carson* case, however, one would now have to assume that this long standing administrative interpretation of the Act was wrong. It would no longer be enough to show that a proposed action would not jeopardize the continued existence of a listed species. Henceforth you would have to show that a given project was contributing to the conservation of affected listed species and would continue to do so until the species were recovered. Thus, it would now be unacceptable for a proposed project to be slightly adverse to a listed species or even neutral in its impacts. It would have to affirmatively promote the recovery of affected listed species, even at the expense of overriding other legally-authorized project purposes.

This simply is not what Congress could have intended, for the resultant impacts would be so extreme and devastating to Federal agency programs that Congress would have unquestionably addressed the matter in the 1978, 1979 and 1982 amendments to the Act. What they addressed instead was the need to provide an exemption to the only substantive standard that they perceived to exist in section 7, the jeopardy standard in subsection 7(a)(2). Throughout the exemption process provisions of the Act, it is a conflict with subsection 7(a)(2) and not subsection 7(a)(1) that is a prerequisite to seeking an exemption. *See* 16 U.S.C. § 1536(f), (g)(1) and (3), (h). Yet the *Carson* ruling puts a gloss on subsection 7(a)(1) that makes it more burdensome than subsection 7(a)(2). Would Congress have spent so must [*sic*] time on subsection 7(a)(2) if subsection 7(a)(1) were even more restrictive? We think that the obvious answer to that question is "no."

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situation where any level of incidental take could satisfy the affirmative conservation standards decreed by the district court in *Carson*. Thus, it is clear that subsection 7(a)(2) contains the only substantive mandate controlling agency action under section 7.

Conclusion

For the reasons stated above, we conclude that the interpretations placed upon the Secretary's conservation responsibilities in the *Carson* case are in error and beyond the intent of Congress. In addition to overlooking the truly relevant subsections of the ESA, the district court misplaced its reliance upon the *Defenders of Wildlife* and *Connor* cases. Those cases should be viewed as fairly narrow cases under the Administrative Procedure Act and nothing more. Moreover, *Tennessee Valley Authority v. Hill* is of questionable relevance, since that case concerned a violation of the substantive prohibition of section 7 (the jeopardy standard) and did not involve the grant of affirmative conservation authority in subsection 7(a)(1). While a Congressionally-mandated set of priorities was established under subsection 7(a)(2) of the Act, no such ordering of project purposes and priorities was established under subsection 7(a)(1). Federal agencies are now empowered to incorporate endangered species concerns into project planning, but so long as the jeopardy standard of subsection 7(a)(2) is not violated, no *particular* conservation goal or priority is required under subsection 7(a)(1).

In short, the district court in the *Carson* case should have upheld the discretionary authority of the Bureau of Reclamation to allocate Stampede Reservoir waters for endangered species conservation purposes and left it at that. As a matter of law, no one conservation regime should be considered favored or mandated as opposed to another. The attempt of the district court to mandate a particular program represents an unwarranted limitation of the discretionary conservation authorities granted to federal agencies. A clarification of these matters should thus be sought on appeal.

/s/ Keith E. Eastin